

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

VINCENT C. GRAY  
MAYOR



F. THOMAS LUPARELLO  
INTERIM DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 13-129**

**JOSE ROMERO,  
Claimant-Petitioner,**

**v.**

**V&V CONSTRUCTION INC. and OHIO CASUALTY INSURANCE,  
Employer and Carrier-Respondents.**

Appeal from an October 8, 2013 Supplemental Order  
Denying Default and Penalties by Administrative Law Judge Linda F. Jory  
AHD No. 10-267A, OWC No. 657345

Michael J. Kitzman, for the Petitioner  
Christopher R. Costible, for the Respondents

Before HEATHER C. LESLIE, JEFFREY P. RUSSELL and MELISSA LIN JONES, ADMINISTRATIVE  
*Appeals Judges.*

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

**DECISION AND ORDER**

**OVERVIEW**

This case is before the Compensation Review Board (CRB) on the request for review filed by the Claimant - Petitioner (Claimant) of the October 8, 2013 Supplemental Order Denying Default and Penalties (Order) issued by an Administrative Law Judge (ALJ) in the Administrative Hearing Division (AHD) of the District of Columbia Department of Employment Services (DOES). In that Order, the ALJ denied the Claimant's request for an order for penalties pursuant to D.C. Code § 32-1515(f). We AFFIRM.

## **FACTS OF RECORD AND PROCEDURAL HISTORY**

After a full evidentiary hearing was held, a Compensation Order (CO) was issued on April 19, 2013 awarding in part the Claimant's claim for relief. The Claimant received a copy of the CO and emailed the Employer a copy of the CO on May 10, 2013. Payment was issued by the Employer on May 14, 2013 but was sent to the wrong address. Payment was eventually reissued and received by the Claimant on June 17, 2013.

On May 20, 2013, the Claimant filed a Motion for Default. The motion was denied by the ALJ on June 7, 2013 because the Employer had not been properly served the CO by AHD.

On June 14, 2013, the Claimant filed a second Motion for Default as the Claimant still had not received payment. On October 8, 2013, an Order was issued denying the Claimant's motion. The ALJ denied the Claimant's motion as the Employer had never been served with the CO pursuant to 7 DCMR § 228.4.

The Claimant timely appealed. The Claimant argues the Order is in error as it is not supported by any factual basis and the ALJ erroneously inserted an element of intent that is not found in the Act or case law, relying on *Hard Rock Café v. DOES*, 911 A.2d 1217 (D.C. 2006). The Employer opposed, arguing the Order is supported by the substantial evidence in the record and should be affirmed. Further, the Employer argues that as the Claimant did not appeal the initial denial order issued on June 7, 2013, finding that the Employer is not liable for penalties is final and cannot be disturbed.

## **THE STANDARD OF REVIEW**

In review of an appeal which is based not upon factual findings made on an evidentiary record, but rather is based upon review of the administrative record, the filings of the parties, and the orders, the Board must affirm the order under review unless it is determined to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. See, 6 Stein, Mitchell & Mezines, ADMINISTRATIVE LAW, § 51.93 (2001).

## **DISCUSSION AND ANALYSIS**

In denying the Claimant's second request for penalties, the ALJ stated,

I find due to an error made by the Administrative Hearings Division's staff, employer was not served with a copy of the April 19, 2013 Compensation Order.

Order at 2.

D.C. Code § 32-1515(f) which provides for the award of penalties for late payment of a CO states:

If any compensation, payable under the terms of an award, is not paid within 10 days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20% thereof, which shall be paid at the same time as, but in addition to, such compensation.

It is well settled that compensation payable pursuant to an award becomes due when the award is properly served upon the Employer by AHD. Thus, the dispositive question in the case at bar is whether or not the Employer was properly served the CO by AHD.

7 DCMR § 228.1 provides

Service by the Office of Hearings and Adjudication Section of a document or notice shall be accomplished by the following:

- (a) Hand deliver the document to each interest party and secure the signature of the recipient; or
- (b) Mail the document by certified or registered mail, return receipt requested, to the last known record address of each party and
- (c) Retain a copy for the official record.

Further, 7 DCMR § 228.4 states:

Whenever the Act or this chapter provides a time period during which an action is to be taken, unless otherwise expressly provided, the time period shall run from the actual receipt of a document.

In the instant appeal, neither party disputes that the Employer was never served a copy of the CO pursuant to § 228.1. While the Claimant did email a copy of the CO to the Employer, under the above regulations proper services was not effectuated. Thus, a determination cannot be made that the payment was not within ten days of employer's receipt as the employer was never properly served. See *Orius Telecommunications v. District of Columbia Department of Employment Services*, 857 A.2d 1061 (August 2004).

Whether the first Supplemental Compensation Order was appealed or not, unless and until a Compensation Order is properly served on the employer, the clock for assessing a penalty does not start running. As a result, all of the other issues about a wrong address and a stop payment and intent and Employer's Counsel receiving a copy of the Compensation Order by fax (from AHD) or by email (from Claimant's Counsel) are red herrings, and although there is no requirement of intent when requesting a penalty, in this case, the ALJ's error in that regard is harmless precisely because Employer was never served with the Compensation Order.

**CONCLUSION AND ORDER**

The October 8, 2013 Supplemental Order Denying Default and Penalties is AFFIRMED.

FOR THE COMPENSATION REVIEW BOARD:

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HEATHER C. LESLIE  
*Administrative Appeals Judge*

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February 27, 2014  
DATE